

Minority Views
S. 167, the “Family Entertainment and Copyright Act of 2005”

While we support the anti-piracy provisions of S. 167, we oppose title II of the bill. Title II consists of the “Family Movie Act of 2004.”¹ With the purported goal of sanitizing undesired content in motion pictures, the Family Movie Act immunizes from copyright and trademark liability any for-profit companies that develop movie-editing software to make content imperceptible without permission from the movies’ creators. Title II takes sides in a private lawsuit, interferes with marketplace negotiations, fails to achieve its goal, is unnecessary and overbroad, may increase the level of undesired content, and impinges on artistic freedom and rights.

The bill’s proponents would have us believe that this bill is about whether children should be forced to watch undesired content, but it is not. The issue in this debate is who should make editorial decisions about what movie content children see: parents or a for-profit company. Supporters of the Family Movie Act believe companies should be allowed to do the editing for profit, and without permission of film creators, while opponents believe parents are the best qualified to know what their children should not see. The legislation would accomplish little beyond inflaming the debate over indecent content in popular media and interfering with marketplace solutions to parental concerns.

That is why the Family Movie Act is opposed by: (1) entities concerned with the intellectual property and artistic rights of creators, including the Directors Guild of America,² the Motion Picture Association of America,³ and the Dean of the UCLA Film School;⁴ and (2) experts on copyright law, such as the Register of Copyrights.⁵

¹The Family Movie Act was introduced as H.R. 4586 in the 108th Congress and was added to H.R. 4077 at full Committee markup in the 108th Congress. A hearing on H.R. 4586 was held at the Subcommittee level.

²*See Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 86 (May 20, 2004) (written statement of Taylor Hackford, Directors Guild of America) [hereinafter *May 20, 2004 Hearing*].

³*Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 67-70 (June 17, 2004) (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Ass’n of America) [hereinafter *H.R. 4586 Hearing*]

⁴Declaration of Dean Robert Rosen In Support of the Director Parties’ Opposition to ClearPlay, Inc.’s, Trilogy Studios, Inc.’s, and Family Shield Technologies, LLC’s Motion for Summary Judgment, *Huntsman v. Soderbergh* (D. Colo.) (02-M-1662) [hereinafter *Rosen Decl.*].

⁵*H.R. 4586 Hearing* at 6 (statement of Marybeth Peters, Register of Copyrights).

A. The Family Movie Act Would Improperly Interfere with Pending Litigation and Prematurely Terminate Marketplace Negotiations to Settle the Dispute

As a preliminary matter, the legislation is inappropriate because it not only addresses the primary issues in a pending lawsuit but also takes sides with one of the parties to that suit. The U.S. District Court for the District of Colorado currently has before it a case that began as an action brought by a company called Clean Flicks against directors of movies.⁶ Clean Flicks sought a declaratory judgment against several directors that its business practice of providing edited versions of movies to consumers does not violate the rights of those who own the copyrights and trademarks for the original movies.⁷

In the course of litigation, the number of parties expanded. Because Clean Flicks claimed that its conduct was lawful under the Copyright Act, the directors sought to join the movie studios in the dispute. In addition, a Utah-based company known as ClearPlay joined on the side of Clean Flicks. ClearPlay employees view motion pictures and create software filters that tag scenes they find offensive in each movie; this editing is done without notice to or permission from the copyright owners (the movie studios) or movie directors.⁸ When downloaded to a specially-adapted DVD player, the ClearPlay software filter instructs the player to “skip and mute” the tagged content when the affiliated DVD movie is played. Consumers who play a DVD they have rented or purchased would thus not see or hear the scenes that ClearPlay has tagged for filtering.

The bill directly addresses copyright and trademark issues raised in the case and inappropriately takes the side of one party. First, the content creators allege in the lawsuit that ClearPlay makes derivative works in violation of the Copyright Act; in particular, they argue ClearPlay’s editing software violates their exclusive rights as movie copyright owners to make modifications or other derivations of the original movies.⁹

⁶Huntsman v. Soderbergh, No. 02-M-1662 (D. Colo. filed Aug. 29, 2002). The parties are awaiting a ruling on a motion for summary judgment.

⁷Complaint and Jury Demand, Huntsman v. Soderbergh (D. Colo.) (No. 02-M-1662).

⁸ClearPlay has fourteen filter settings: (1) strong action violence, (2) gory/brutal violence, (3) disturbing images (i.e., macabre and bloody images), (4) sensual content, (5) crude sexual content, (6) nudity (including art), (7) explicit sexual situations, (8) vain references to deity, (9) crude language and humor, (10) ethnic and racial slurs, (11) cursing, (12) strong profanity, (13) graphic vulgarity, and (14) explicit drug use.

⁹See The Player Control Parties’ Opening Brief in Support of Their Motion for Summary Judgment, Huntsman v. Soderbergh (D. Colo.) (No. 02-M-1662). Section 106(2) of title 17, United States Code, gives to authors the exclusive right to “prepare derivative works based on the copyrighted work.” The Copyright Act further defines a “derivative work” as “a work based

Though no court has ruled on this issue, the bill would assist ClearPlay by preemptively vitiating this legal claim. It would amend the law to state that certain technology which makes portions of motion picture content imperceptible during playback does not violate copyright law. While not benefitting Clean Flicks and certain other defendants, the bill is specifically designed to legalize ClearPlay technology.

Second, film directors claim that ClearPlay violates their trademark rights under section 43(a) of the Lanham Act.¹⁰ The directors allege that ClearPlay uses their trademarked names in a way that is likely to cause confusion as to the affiliation, connection, or association of ClearPlay with the director, or as to the origin, sponsorship, or approval of ClearPlay by the director.¹¹ Their allegation is based on the fact that a ClearPlay-sanitized film still indicates the name of the director, making it incorrectly appear as if the director has approved the sanitized version.

As with the copyright claims against ClearPlay, the bill would usurp judicial consideration of the trademark claims against ClearPlay by legalizing the very conduct at issue in the pending litigation. The bill would make it legal under trademark law to sell a product that alters a work so long as clear and conspicuous notice is provided at the beginning of each performance indicating it has been altered from the performance intended by the director or copyright owner. The effect would again be to specifically benefit one party, ClearPlay, to the detriment of all others involved in pending litigation.

In summary, the directors and movie studios have non-frivolous legal claims against ClearPlay. Because the case has not proceeded past the most preliminary stages at the trial level, there has not been any statutory interpretation, let alone a problematic one, that would justify a

upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work.’” 17 U.S.C. § 101.

The Register of Copyrights has testified as to her opinion about the copyright issues involved in the case. The Register believes that infringement of the exclusive right under 17 U.S.C. § 106(2) to make derivative works requires creation of a fixed copy of a derivative work. *H.R. 4586 Hearing* at 7. While the Register’s opinion clearly bears much authority, it is neither binding on a court nor dispositive of the pending lawsuit. Due to the novelty of both the legal and technological issues involved, the court may very well reach a different conclusion from that drawn by the Register.

¹⁰See The Player Control Parties’ Opening Brief in Support of Their Motion for Summary Judgment, *Huntsman v. Soderbergh* (D. Colo.) (No. 02-M-1662).

¹¹See 15 U.S.C. § 1125(a)(1).

legislative solution. In other words, the law has yet to be interpreted in this area, so there is no rational basis for Congress to pass legislation that eliminates certain copyright and trademark rights that are at issue between specific parties.

Passage of this legislation is even more problematic considering that, over the past year, movie creators have negotiated in good faith to settle their dispute with ClearPlay. The movie creators had offered ClearPlay terms that would allow it to deploy its technology without fear of copyright or trademark liability.¹² Unfortunately, due to the two hearings on this issue and the movement of this legislation, those negotiations have stalled; ClearPlay has been emboldened to present several new demands that represent a significant step back from its previous positions. The growing prospects for a legislative fix have caused ClearPlay to abandon good-faith negotiation and have made it less likely that consumers will have the choices the bill's proponents allegedly desire.

In short, fundamental fairness prohibits Congress from passing legislation to influence a pending case and private business negotiations. As a matter of equity, it is unfair to change the rules in the middle of the game, particularly to help one specific entity; if passed, title II would be an unfortunate example of such unfairness. For these reasons, title II should not be considered while litigation is pending.¹³

¹²Despite the extremely complicated nature of these negotiations, they had proceeded quite far. In December 2003, the DGA agreed not to object under its collective bargaining agreement if the studios offered ClearPlay a license to utilize the edits contained in television and airplane versions of movies. The DGA believed this compromise was tolerable because a film's director usually makes the necessary edits for television and airplane versions and is able to control the integrity of such edited versions. Over the course of the next several months, the studios conveyed an offer along these lines to ClearPlay.

More recently, ClearPlay presented the studios with a counteroffer. The studios forwarded this counteroffer to the DGA for its response. In a May 29, 2004 response, the DGA relaxed certain limitations on a previous agreement to allow ClearPlay to license the television and airplane versions of movies. Rather than accept this offer, or present a good-faith counteroffer, ClearPlay apparently has enlarged its demands: (1) for movies where, no airplane or television version is available, it has sought the ability to edit them; and (2) with regard to films for which television or airplane versions have been made available, it is asking that it be able to make its own edits, rather than use the pre-existing edited versions.

¹³*See H.R. 4586 Hearing* at 8 (statement of Marybeth Peters, Register of Copyrights) ("I do not believe that such legislation should be enacted – and certainly not at this time. As you know, litigation addressing whether the manufacture and distribution of such software violates the copyright law and the Lanham Act is currently pending in the United States District Court for the District of Colorado. A summary judgment motion is pending. The court has not yet ruled on the merits. Nor has a preliminary injunction been issued – or even sought.").

B. The Family Movie Act is Unnecessary

Regardless of the outcome of the pending litigation, this legislation should not be brought before the House because it is unnecessary. Its supposed rationale is to make it easier for parents and children to avoid watching motion pictures with undesired content, but parents and children already have such options.

At the outset, there is an obvious marketplace solution to undesired content in that consumers can merely elect not to view it. As the Register of Copyrights testified at a hearing on the issue of whether a legislative fix was necessary:

I cannot accept the proposition that not to permit parents to use such products means that they are somehow forced to expose their children (or themselves) to unwanted depictions of violence, sex and profanity. *There is an obvious choice – one which any parent can and should make: don't let your children watch a movie unless you approve of the content of the entire movie.*¹⁴

The motion picture industry has even enhanced the ability of consumers to exercise this choice. For decades and on a voluntary basis, it has implemented a rating system for its products that indicates the level of sexual or violent content and the target audience age.¹⁵ Each and every major motion picture released in theaters or on DVD or VHS bears such a rating. Such ratings effectively enable parents to steer their children away from movies they consider inappropriate.

Most importantly, the film rating system enable parents to identify movies that they consider appropriate for their children, and the industry has acted to make this choice meaningful. The industry annually releases dozens of films geared toward audiences who do not wish to see sexual, violent, or profane content.¹⁶ As a result, it is clear that the movie industry provides parents with abundant opportunity to find films they will consider appropriate for their children. The movie industry has, therefore, already met the request of an H.R. 4586 supporter

¹⁴H.R. 4586 Hearing at 9 (written statement of Marybeth Peters) (emphasis added).

¹⁵Motion Picture Ass'n of America, Movie Rating System Celebrates 34th Anniversary with Overwhelming Parental Support (Oct. 31, 2002) (press release). The industry has five rating categories: G for General Audiences, PG for Parental Guidance Suggested, PG-13 for Parental Caution Suggested for children under 13, R for Restricted (parent or guardian required for children under 17), and NC-17 for No Children 17 and under admitted.

¹⁶In 1999, filmmakers released 14 G-rated and 24 PG-rated major motion pictures. In 2000, there were 16 G-rated and 27 PG-rated films. In 2001, 8 G-rated and 27 PG-rated movies were released. In 2002, 12 G-rated and 50 PG-rated pictures were distributed. Finally, in 2003, 11 G-rated and 34 PG-rated motion pictures were released.

who looked forward to a day when “the industry will get around to issue us age-appropriate products.”¹⁷

While some of the bill’s supporters say these choices are meaningless on the grounds that the entertainment industry markets violent and sexual content to youth,¹⁸ that claim is false according to the most recent and objective report. The Federal Trade Commission conducted the most recent study on this issue and concluded the following:

On the whole, the motion picture industry has continued to comply with its pledge not to specifically target children under 17 when advertising films rated R for violence. In addition, the studios generally are providing clear and conspicuous ratings and rating information in advertisements for their R- and PG-13 rated films.¹⁹

The industry is, therefore, doing its part to keep undesired content away from children.

The facts demonstrate that parents have the information and tools necessary to make and enforce informed choices about the media their children experience and have plenty of wholesome media alternatives to offer their children.

C. The Family Movie Act Would Legalize Editing that is Incomprehensible and Overbroad and Would Lead to an Increase in Undesired Content

The Family Movie Act would lead to editing that is inconsistent, overbroad, and counterproductive. First, ClearPlay does not screen out the content it purportedly is designed to filter. The *New York Times* found that ClearPlay’s editing does not conform to its own standards:

For starters, its editors are wildly inconsistent. They duly mute every “Oh my God,” “You bastard,” and “We’re gonna have a helluva time” (meaning sex). But they leave intact various examples of crude teen slang and a term for the male anatomy.

¹⁷*H.R. 4586 Hearing* at 15 (statement of Amitai Etzioni, Founder and Director, The Institute for Communitarian Policy Studies, George Washington University).

¹⁸*May 20, 2004 Hearing* at 20 (statement of Jeff J. McIntyre, Senior Legislative and Federal Affairs Officer, American Psychological Ass’n).

¹⁹FEDERAL TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 10 (July 2004).

In “Pirates of the Caribbean,” “God-forsaken island” is bleeped, but “heathen gods” slips through.²⁰

In this regard, ClearPlay is seemingly ineffective, and the legislation would be, as well.

Second, the legislation is overbroad and would go beyond its allegedly intended effects of legalizing tools for sanitizing movies of sex, violence, and profanity. In fact, title II would legalize a far wider and less desirable universe of filters for profit than its sponsors have disclosed. Filters could be based on social, political, and professional prejudices and could edit more than just movies.

For instance, because the bill is not explicitly limited to the deletion of sex, violence, and profanity, it would legalize socially-undesirable editing, such as:

- A filter that edits out racial conflict between law enforcement and minorities in *The Hurricane*, conflict that sets the context for how the minorities later react to the police;²¹
- A filter that skips over the nude scenes from *Schindler’s List*, scenes that are critical to conveying the debasement and dehumanization suffered by concentration camp prisoners;
- A filter that strips *Jungle Fever* of scenes showing interracial romance and leaves only those scenes depicting interracial conflict; and
- A filter marketed by Holocaust revisionists that removes from World War II documentaries any footage of concentration camps.

The legislation also would immunize products that filter political or business content based on the opinions of the creator, including:

- A filter that skips over political advertisements contrary to the positions of the developer’s beliefs;

²⁰David Pogue, *Add ‘Cut’ and ‘Bleep’ to a DVD’s Options*, N.Y. TIMES, May 27, 2004, at G1.

²¹ClearPlay actually has made such edits. “In its alterations of the film, ClearPlay chooses to omit the racist language [used by white police officers against a young Rubin Carter] that is integral to our understanding of the story. . . . ClearPlay skips these lines in full, choosing to fast-forward its version of the movie to a later part of the interrogation scene. However, it is via this racist and threatening language that the audience connects with the intimidation that the young Carter must feel and the racism he is encountering at the very center of law enforcement.” Rosen Decl., *supra* note 4, at 6-7.

- A filter that cleanses news stories, such as by editing out comments in support of or in opposition to government policies; and
- A filter that deletes television stories either helpful to the filter developer's competitor or critical of the developer's corporate parent.

We would hope that none of the bill's proponents would condone such malicious editing. Unfortunately, at last year's full Committee markup of similar legislation, the sponsors rejected an effort to limit the proposal to its purported scope of profane, sexual, and violent content.²² If enacted, title II could lead to the editing of artistic works based upon racial, religious, social, political, and business biases.

Finally, the legislation could lead to increased violence and sexual content in entertainment. Just as title II allows nudity to be edited out, it allows everything *except* nudity to be deleted. This concern is not merely hypothetical. Nissim Corporation has patented a technology called CustomPlay that, among other things, enables viewers of pornographic movies to filter out the non-pornographic scenes and "enhance" the adult-viewing experience.²³

Because title II only protects technology developers like ClearPlay from liability for copyright and trademark infringement, Nissim may cause the bill to backfire on its sponsors. Nissim has sued ClearPlay for patent infringement, claiming to have a patent on ClearPlay-type film-editing technology.²⁴ If Nissim's claims are valid, then only Nissim could distribute such film-editing software.²⁵ Thus, contrary to its stated purpose, the Family Movie Act could succeed

²²*See Markup of H.R. 4586 Before the House Comm. on the Judiciary*, 108th Cong., 2d Sess. (July 21, 2004) (amendment offered by Rep. Adam Schiff (D-CA) to limit editing to profane, sexual, and violent content) [hereinafter *H.R. 4586 Markup*]. The amendment was defeated by voice vote. *Id.*

²³Using CustomPlay, "[a]n adult can play a version of an adult video that seamlessly excludes content inconsistent with the viewer's adult content preferences, and that is presented at a level of explicitness preferred by the adult. Adult content categories are standardized and are organized into five groups Who, What, Camera, Position, and Fetish." CustomPlay, Content Preferences (visited Aug. 24, 2004) <<http://www.customplay.com/mccontent.htm>>.

²⁴*Nissim Corp. v. ClearPlay*, No. 04-21140 (S.D. Fla. filed May 13, 2004).

²⁵In response to a cease-and-desist letter from Nissim, a manufacturer of DVD players, Thomson, pulled ClearPlay-enabled players from the retail market.

in legalizing only Nissim's technology, which enables users to *increase* the proportion of sex or violence in a movie.²⁶

D. The Family Movie Act Would Impair Artistic Freedom and Integrity

The problems with this legislation are compounded by the fact that it violates principles of artistic freedom and expression. The concept of protecting artistic freedom is well recognized.²⁷ The National Endowment for the Arts states "[a]rtistic work and freedom of expression are a vital part of any democratic society."²⁸ For this reason, the NEA seeks to preserve works of art,²⁹ and an important part of preservation is to ensure artists are involved in how their creations are portrayed.

²⁶In analyzing the overbreadth of the legislation, we also note that it does not legalize technology that would skip over advertisements in broadcast television. The Copyright Office has stated that the bill would not permit commercial ad skipping on the grounds that each ad, in and of itself, would be a separate 'motion picture;' skipping the entirety of an ad would go beyond the extent of the bill's authority of making 'limited portions imperceptible.' See Letter from Marybeth Peters, Register of Copyrights, to the Honorable F. James Sensenbrenner, Jr., and the Honorable Lamar Smith (Nov. 15, 2004).

Moreover, the legislation's original sponsor, Sen. Orrin Hatch (R-UT), further noted in his statement introducing the bill:

An advertisement, under the Copyright Act, is itself a 'motion picture,' and thus a product or service that enables the skipping of an entire advertisement, in any media, would be beyond the scope of the exemption. Moreover, the phrase 'limited portions' is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work, such as a commercial advertisement, is made imperceptible, the new section 110(11) exemption would not apply. 151 CONG. REC. S495 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

²⁷SAM RICKETSON, THE BERNE CONVENTION: 1886-1986 456 (1997) ("Any author, whether he writes, paints, or composes, embodies some part of himself – his thoughts, ideas, sentiments and feelings – in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law, such as reputation, bodily integrity, and confidences. The interest in question here relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained.").

²⁸NATIONAL ENDOWMENT FOR THE ARTS, STRATEGIC PLAN: FY2003-2008 3 (Feb. 2003).

²⁹*Id.* at 8.

This principle, commonly referred to as a “moral right,” is so important that it is required by international agreements and is codified in U.S. law. For instance, the Berne Convention for the Protection of Literary and Artistic Works grants creators the right to object to “any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”³⁰ The United States, recognizing the importance of this right, subsequently enacted it into both copyright law³¹ and trademark law.³²

While moral rights protection for U.S. creators is far weaker than the protection afforded European creators, a certain level of protection for the moral rights of U.S. creators does exist. The ability of creators to bring claims under the Lanham Act, just as directors have done against ClearPlay, does provide creators with an important ability to protect their moral rights. In fact, the availability of section 43(a) was one of the specific reasons Congress decided, during adoption of the Berne Convention Implementation Act, that U.S. law met the moral rights obligations contained in the Berne Convention.³³ By limiting the availability of Lanham Act suits, title II would limit the moral rights of directors in a way that conflicts with U.S. obligations under the Berne Convention.

Contrary to our laws and international obligations, title II does not require that filtering be done with the permission of the content creator or owner, but rather creates an exemption from copyright and trademark liability for filtering. As the Register of Copyrights stated before the Subcommittee:

I have serious reservations about enacting legislation that permits persons other than the creators or authorized distributors of a motion picture to make a profit by selling adaptations of somebody else’s motion picture. It’s one thing to say that an individual, in the privacy of his or her home, should be able to filter out undesired scenes or [dialogue] from his or her private home viewing of a movie. It’s another matter to say that a for-profit company should be able to commercially market a product that alters a director’s artistic vision.³⁴

³⁰Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, 1971.

³¹17 U.S.C. § 106A.

³²15 U.S.C. § 1125.

³³133 CONG. REC. H1293 (daily ed. Mar. 16, 1987) (statement of Rep. Robert Kastenmeier).

³⁴*H.R. 4586 Hearing* at 10 (written statement of Marybeth Peters).

It is clear, therefore, that the legislation represents a threat to an artist's right to his or her artistic integrity. To permit editing of a creation without the permission of the creator is to encourage censorship and to vitiate freedom of expression.

In conclusion, the Family Movie Act is ill-conceived, poorly-drafted legislation. Beyond its patent assault on intellectual property rights, the bill inappropriately involves Congress in a private business dispute and would lead to socially undesirable editing and actually permit the distribution of technology that makes pornography *even more* pornographic. Finally, it encourages unwarranted intrusions into artistic freedom.

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